Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

SCOT WINLOCK,

Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Dated October 12, 2010

QUESTIONS PRESENTED

Whether the Merit System Protection Board erred in concluding that the Administrative Judge failed to give proper weight to evidence presented by Agency in support of its contention that a clear and direct nexus exists between Appellant's failure of the SOP quizzes and a legitimate government interest.

Did respondent prove that the Administrative Judge's decision was not based on an erroneous interpretation of statute or law or regulation permitting the Merit System Protection Board's review of the decision under 5 C.F.R. §1201.115.

Whether Respondent proved that deemed failure of the SOP quizzes to be poor performance sufficiently demonstrates a clear and direct nexus between Appellant's failure of the SOP quizzes and his ability to perform the duties of his position or a legitimate government interest.

Assuming that the Respondent's charges were meritorious, did respondent prove that Petitioner's removal promotes the efficiency of the service, notwithstanding Respondent's failure to engage in a reasoned, thorough consideration of the *Douglas* factors and to select a penalty that was within the bounds of reasonableness?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, of the Rules of the Supreme Court of the United States, Scot Winlock certifies that he is not a corporation.

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DECISIONS BELOW

By memorandum dated February 8, 2008, Petitioner, Scot Winlock was issued a letter of removal from his position at Department of Homeland Security. The stated reason for the removal was unsatisfactory performance

By Initial Decision dated September 5, 2008, Administrative Judge ("AJ"), Marie A. Malouf, for the Dallas Regional Office of the Merit Systems Protection Board ("Board") reversed the Agency's decision to remove Petitioner, Docket PH-0752-08-0041-I-1.

Prior to the AJ's order becoming final, on October 8, 2008, the Respondent timely filed a Petition for Review ("PFR") with the full Board.

The full Board reversed the AJ's order and issued a final order, as per Docket DA-0752-08-00261-I-1 on March 6, 2009.

On May 4, 2009, Petitioner timely filed a Notice of Appeal in United States Court of Appeals for the Federal Circuit ("Federal Circuit").

By Judgment dated April 9, 2010, the Federal Circuit affirmed the decision set forth in the Board's final order, Case Number 2009-3170.

Appellant moved the Federal Circuit for both a motion for re-hearing and for a rehearing En Banc,

which was denied by the Court in an order dated July 13, 2010.

JURISDICTION

By Judgment dated July 13, 2010, the United States Court of Appeals for the Federal Circuit, affirmed the Merit Systems Protection Board's final order affirming Respondent's removal of Petitioner. This Court has jurisdiction under 28 U.S.C. § 1254, which allows for review of cases in the courts of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

5 C.F.R. 1201.56(c)(1) (2007), in relevant part, defines substantial evidence as follows:

> "The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree."

5 C.F.R. 1201.56(c)(3) (2007), in pertinent part, defines harmful error as follows:

> "Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from

the one it would have reached in the absence or cure of the error."

5 U.S.C. 7703(c) is as follows:

"(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision— ..."

"(B) in any other case, is supported by a preponderance of the evidence."

"(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302 (b) of this title; or

(C) shows that the decision was not in accordance with law. "

STATEMENT OF THE CASE

This appeal involves the reasonableness of the Federal Circuit's decision to affirm the Board's decision to affirm Petitioner's. The basis for federal jurisdiction in the Merit Systems Protection Board is 5 U.S.C. §§ 7511-7513. The basis for federal jurisdiction in the Federal Circuit is 5 U.S.C. §

7703(b)(1), which permits court of appeals review of final orders and decisions by the Board.

This is a case involving improper removal. Appellant was removed from his position as a Screening Manager with the Department of Homeland Security, Transportation Security Administration ("TSA" or "Agency") for failing to pass two (2) standard operating procedure quizzes. Under Agency rules, two failures of the quizzes were deemed to be overall poor performance, and poor performance required termination.

Notwithstanding that Appellant was deemed to have failed these quizzes, his performance reviews and actual performance showed that he was a competent employee who performed all duties of his position properly and without issue. In addition, the material tested on the quizzes was not relevant to the required duties of Appellant's position. Despite the fact that Appellant was a solid employee whose actual performance was excellent and that the quizzes he failed were not relevant to his position, he was removed from his position. Upon Appellant's removal, he appealed.

On April 4, 2004, Winlock was promoted to the position of Screening Manager at the Tulsa International Airport. On April 1, 2007, the Screening Manager positions were renamed Transportation Security Manager ("TSM"). The name change did not entail a change in duties or requirements.

Throughout his career Winlock's qualifications and the ability to perform his job duties was never at issue. On January 13, 2007, the Performance Accountability and Standards System ("PASS") was implemented. The PASS system was set up as a pay for performance program and a reward system for performance ratings. PASS rated TSM's on numerous performance components, including "Management and Technical Proficiency." The Management and Technical Proficiency component of Pass encompassed knowledge of Standard Operating Procedures ("SOP"). The SOP are detailed standards that set out the policies and techniques for screening passengers and baggage. When PASS was implemented, Winlock understood the program as a reward system and that one could "opt out" of this program by completing a form. Winlock and other TSM's were not responsible for screening passengers and baggage. Mr. Winlock and even his supervisors, based on their written statement in the file, believed the PASS System had flexibility regarding the testing requirements. They were responsible for supervising the security officers who screen baggage and passengers. Under PASS, TSM's were required to prove their ability to perform the technical aspects of their duties by taking various quizzes on the SOP ("SOPQ's" or "SOP quizzes"). App at 87a. Agency policy required Winlock to achieve a passing score on two (2) of the SOP quizzes within the 2007 fiscal year. To achieve a passing score, Winlock needed to achieve a score of at least eighty percent (80%) on the SOP quizzes. Under agency policy, if a passing score is not attained on the SOP component of the Management

and Technical Proficiency portion of Pass, the TSM would be deemed to have not achieved required standards on the entire Management and Technical Proficiency portion of PASS. Robert Johnson ("Johnson"), Agency's Assistant Federal Security Director for Training and Phil Anderson ("Anderson"), the "Team Lead for the Office of Performance Management and Improvement ("OPMI")", each testified that the SOP portion a TSM's overall PASS rating accounts only for approximately three percent (3%) of overall performance. App. at 93a . Winlock took the SOP quiz #1 covering the baggage questions, which he had significant experience in performing these duties. On May 30, 2007, Winlock scored 18 of 25 questions on as a different quiz, unrelated to the core of his duties. He was then placed on a Performance Improvement Plan (PIP), not because he was not competent to perform his duties, but because his score on SOP quiz #3. He was also given thirty (30) minutes of remedial training on the SOP's in the sections he failed. It would appear logical that he would take SOP quiz #2, or the SOP quiz #3 that he failed, but he was then told he would have to take SOP quiz #4, a totally different exam. Even more importantly, he was told he would have to score 80% on this exam. Winlock was also instructed that he would have to go to the Basic Screening Screener training class. All of this testing and remedial classes took time out of his ability to perform critical tasks at the airport and would seem to distract from the "Mission" that the TSA believes is imperative to the functioning of the system. On August 20, 2007, Winlock took SOP Quiz #4 and

received 18 of 25 on this exam. He was then told that his score was two points less than the Agency desired and that his overall performance was "Not Achieving Standards", notwithstanding that the SOP portion of the PASS evaluation system account only for approximately three percent (3%). On November 13, 2007, the Assistant Federal Security Director, Robert C. Johnson issued Winlock a "Proposed Removal for Poor Performance." Johnson was extremely reluctant to issue the proposed removal. App. at 94a. On February 8, 2008, Winlock was removed from his position at the Tulsa International Airport, for the stated reason of poor performance, App. at 81a, notwithstanding that Winlock's supervisor, Johnson fought against the removal. App. at 94a.

Although the AJ ruled for Appellant, the MSPB reversed concluding that the AJ failed to properly weigh the evidence presented by Agency in support of its contention that a clear and direct nexus exists between Appellant's quiz failure and a legitimate government interest. The agency submitted a Management Directive as part of a pay for performance review system which automatically deemed failure of the SOP quizzes to be poor performance that required termination. Instead of relying on Agency's Management Directive, the AJ who judged credibility, in his discretion, considered undisputed objective facts to arrive at the conclusion that Winlock's quiz failure did not negatively impact his ability to perform his job or any legitimate government interest.

The Board in *Gager* further explained, citing *Broughton v. Department of Health & Human*

Services, 33 M.S.P.R. 357, 359 (1987), that it: "[G]enerally . . . will not disturb an Administrative Judge's conclusions where an appellant's petition for review fails to identify any internal inconsistency or inherent improbability in the Administrative Judge's fact findings or other basis sufficient to overcome the deference, which reviewing bodies must necessarily accord the factual determinations of the original trier of fact, and where the initial decision reflects that the Administrative Judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Furthermore, the Board in Gager, citing *Weaver*, supra., stated that before it will "undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect and identify the specific evidence in the record which demonstrates the error." In this case, the AJ had adequate reason to rule for Appellant.

For Agency's adverse action against Winlock to be upheld, Agency must prove three things (1) the misconduct or the charge; (2) the nexus between the action and a legitimate governmental interest; and (2) the reasonableness of the penalty. See *Douglas v. VA*, 5 M.S.P.R. 280 (1981); *Hale v. Dept. of Transp.*, 772 F. 2d 882 (Fed. Cir. 1985). Agency bears the burden of supporting its removal action by a preponderant of the evidence 5 U.S.C. § 7701(c)(1)(b); 5 C.F.R. § 1201.56(a)(1)(ii); *Smith v. Department of Transp.*, 106 M.S.P.R. 59 Paragraph 15 (2007). The Agency's Management Directive that allegedly required Winlock's termination provides

that a nexus is presumed in cases of unsatisfactory performance. App. at 90a. The Agency's Management Directive does not expressly state or imply that failure of the SOPQ's constitutes poor performance. To that end, the Administrative Judge properly determined that in viewing the record as a whole, Mr. Winlock's failure of the SOPQ's did not constitute poor performance. In their petition for review and throughout the record, Agency recites the confusing and convoluted PASS testing requirements on which it relies as justification for Winlock's termination.

Nothing other than circular reasoning establishes that the quiz failure constituted poor performance. Therefore, the Administrative Judge properly relied on and weighed the credibility of the following in determining that Winlock should be reinstated: (1) the SOPQ's accounted only for approximately three (3%) of Winlock's performance evaluation, (2) Winlock was considered by his superiors to be a stellar employee and had no issues performing his job, and (3) the SOPQ's, by Agency's own admission, did not evaluate Winlock's actual job duties.

Winlock's Security Manager Pass Performance Rating Summary Sheet for FY 2007 reflects the following: (1) a "Does not Meet" on Security Manager Technical Proficiency, but an "Achieves" and "Exceed" on all of the other components under Management and Technical Proficiency; (2) an "Achieves" on Training and Development; (3) a "Role Model of Excellent" on

Readiness for Duty; (4) an "Achieves" on Competencies; and (6) a recommendation for a 6% bonus allocation for his performance. App. at 71a. The SOPQ requirements are part of Technical Proficiency portion of the performance rating, but do not constitute the entire performance component of that section. Robert Johnson ("Johnson"), Agency's Assistant Federal Security Director for Training testified that the SOPQ's were only approximately three percent (3 %) of the overall performance score for Winlock. App. at 93a. In an email exchange on October 18, 2007 in which Johnson argued against removing Winlock for failing the SOPQ's, Johnson even described Winlock as high performing and as a significant contributor to the Federal Security Director's staff. App at 83a. Phil Anderson ("Anderson"), the "Team Lead for the Office of Performance Management and Improvement (OPMI)", also stated that the SOP portion of Winlock's performance evaluation accounts for only approximately three percent (3%) of overall performance. App. at 97a. Anderson conceded that the Agency did not perform follow up to determine whether the SOPQ test related to the actual performance of a TSM's duties. Id.

Notwithstanding the alleged critical nature of the knowledge tested on the SOPQ's, TSM's were never retested on the new material issued on the eight (8) occasions during the period the quizzes were in effect. App. at 98a. Dan McCann, another Agency manager, stated that with regard to SOP quizzing of TSM's, "they're being tested/trained to standards they are not recruited/trained/evaluated

against." App. at 85a. McCann further stated TSM's are never meant to be certified Security Officers, and should not be evaluated based on a test designed to determine whether or not security officers are performing well. *Id* and that the SOPQ's was designed to test the employee's knowledge of the SOP's. App. at 96a. Knowledge of the SOP's is very different from knowledge and ability to perform their job duties.

The nexus requirement, for purposes of whether an agency has shown that its imposition of an adverse action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. See *Daigle v. Dept. of Air Force*, 97 M.S.P.R. 605 (2004) citing *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), modified, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 (1987). As discussed above, no clear and direct relationship exists between Agency's articulated grounds for removing Winlock and Winlock's ability to perform his job. The Agency articulated that it removed Winlock for failing the SOPQ and because they claim that Agency's policy requires removal for such failure. However, there is no clear and direct relationship between failure of the test or any policy requiring removal under such circumstances and Winlock's ability to accomplish his duties satisfactorily. By Agency's own admission, the SOPQ did not evaluate Winlock's actual job duties. Winlock's failure of the

SOPQ demonstrated nothing except that he did not perform well on tests. Winlock was viewed as a stellar and high performing TSM in all other regards.

The SOPQ failures that allegedly caused Winlock to be removed occurred in 2007. Winlock's Security Manager Pass Performance Rating Summary Sheet for FY 2007 reflects the following: (1) a "Does not Meet" on Security Manager Technical Proficiency, but an "Achieves" and "Exceed" on all of the other components under Management and Technical Proficiency; (2) an "Achieves" on Training and Development; (3) a "Role Model of Excellent" on Readiness for Duty; (4) an "Achieves" on Competencies; and (6) a recommendation for a 6% bonus allocation for his performance. App. at 51a. The only portion of the performance rating that is deficient is the Technical Proficiency portion. The "Does Not Meet" rating in the Technical Proficiency portion is attributed solely to the fact that Winlock did not pass the required SOP quizzes.

The Board has held time and time again that no clear and direct relationship between grounds for an adverse action and a legitimate government interest is established by conclusory speculations offered by supervisors and managers. *See Jefferson and Dean v. USPS,* 73 M.S.P.R. 376 (1997); *Ciulla v. USPS,* 37 M.S.P.R. 627 (1988); and *Schaffer v. USPS*, 39 M.S.P.R. 153, 158 (1988).

The Agency's proof must be thoroughly reasoned and substantiated, not conclusory. See *Ciulla v. USPS*, 37 M.S.P.R. 627 (1988). The Agency

must spell the impact of the misconduct in real, agency specific terms. *Canevari v. Dept. of Treasury*, 50 M.S.P.R. 311 (1991). In other words, the Agency must articulate a real and substantiated harm caused by Winlock's failure of the test, as opposed to advancing an array of what the supervisors and managers believe "could" happen if Winlock is not familiar with the materials tested on the SOPQ's.

The Board has been clear in setting forth that the nexus requirement is supported only by a clear and direct relationship between the misconduct and a legitimate government interest or the employee's ability to perform their duties. As shown above, this clear and direct relationship must be supported by a showing of actual harm, rather than by advancement of conclusory and speculative outlooks of what "could have" happened. That Agency's advancement of what could happen is simply not sufficient to establish the required nexus.

The Board has recognized three independent means by which an agency may show the required nexus between employee conduct and the employee's ability to perform his/her duties or a legitimate government interest: (a) a rebuttable presumption may arise in "certain egregious circumstances" based on the nature and the gravity of the misconduct; (b) a showing by a preponderant of evidence that the misconduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; and (c) a showing by a preponderance of evidence that the misconduct interfered with or

adversely affected the agency's mission. *Kruger v. Dept. of Justice*, 32 M.S.P.R. 71, 74-76 (1987).

As discussed above, Agency failed to show by a preponderance of evidence that Winlock's failure of the SOPQ's affected his or his co-worker's job performance, management's trust and confidence of his job performance, or interfered with or adversely affected the Agency's mission. The Agency's Management Directive that allegedly required Winlock's termination provides that the required nexus is presumed in cases of unsatisfactory performance. App. at 90a. Instead of examining the legal issue of whether such a presumption is rebuttable by the facts examined by the Administrative Judge, MSPB erroneously relied on the presumption to establish the nexus required to sustain Winlock's removal. App. at 70a.

The nexus explains why the misconduct warrants the ensuing adverse action. To rely on Agency's own rendition of activity that creates a nexus leaves agencies with unchecked power to establish rules that trample employee rights under the merit system and negates entirely the purpose of the appellate process. In *Otero v. USPS*, 73 M.S.P.R. 198 (1997), MSPB held that efficiency of service is the main determinant of whether an adverse action is appropriate. *Otero v. USPS*, 73 M.S.P.R. 198, 202-203 (1997).

The nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the

articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. See *Daigle v. Dept. of Air Force*, 97 M.S.P.R. 605 (2004) citing *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), modified, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). Under *Daigle* and *Otero*, notwithstanding the presumption of a nexus found in Agency's Management directive, for Winlock's removal to be lawful, Agency must have proven by a preponderance of the evidence that a clear and direct relationship exists between Winlock's failure of the SOPQ and Winlock's ability to successfully perform his duties as a TSM. Respondent advanced no facts to state or support that Winlock's failure of the SOPQ's caused any actual or tangible harm or breach of the protection of the traveling public.

REASONS FOR GRANTING PETITION

I. AFFIRMANCE OF PETITIONER'S REMOVAL WAS IN ERROR, BECAUSE THE CHARGES ARE UNSUPPORTED BY SUBSTAINTIAL EVIDENCE ON THE RECORD.

As stated above, at length, the reasons for removal were in error, as they constituted only 3% of non-essential functions and responsibilities of Petitioner's position.

II. EVEN IF THE BOARD'S DECISION TO SUSTAIN THE CHARGES AGAINST PETITIONER WAS NOT IN ERROR, THE BOARD ERRED WHEN IT UPHELD THE AGENCY'S DECISION THAT REMOVAL WAS AN APPROPRIATE PENALTY; THUS, MITIGATION IS WARRANTED.

The Board's role in reviewing an agency's penalty selection is to determine whether management exercised its judgment within tolerable limits of reasonableness. *C.F. Gray v. U.S. Postal Service*, 97 M.S.P.R. 617 (2004), aff'd, No. 05-3074, 2005 WL 1368093 (Fed. Cir. June 9, 2005).

Although federal agencies have great discretion in deciding upon appropriate disciplinary action for misconduct, that discretion is not unfettered. The Board and the Court have generally reviewed an agency's exercise of discretion in the imposition of a penalty to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness, See *Smith v. Department of Air Force*, 48 M.S.P.R. 594 at 599 (1991), citing *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 1981). Further, even though an agency's own internal disciplinary regulations and/or table of penalties allow for discipline under the circumstances that is only one factor to be considered in determining the appropriateness of the penalty. See *Basquez v. Department of the Air Force*, 48 M.S.P.R. 215 at 218 (1991).

In Douglas v. Veterans Administration, the seminal case that delineated the framework by which the reasonableness of proposed penalties should be evaluated, the Board outlined the factors that must be considered in determining the appropriate penalty for infractions committed by federal employees. 5 M.S.P.R. at 330-335. Under Douglas in assessing whether a given penalty is reasonable, the following factors must be considered: (1) the nature and seriousness of the offense, and its relation to the employer's duties, position, and responsibilities (including whether the offense was intentional; technical or inadvertent; or was committed maliciously or for gain; or was frequently repeated); (2) the employee's job level and type of employment; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service and performance on the job; (5) the effect of the offense upon the employee's ability to perform work at a satisfactory level; (6) consistency of the penalty with the agency's table of penalties; (8) the notoriety of the offense; (9) the clarity with which the employee was on notice of any rules that were violated; (10) the potential for the employee's rehabilitation; (11) the mitigating circumstances surrounding the offense, such as unusual job tension and personality problems; and (12) the adequacy and effectiveness of alternative sanctions. Id. at 332.

Although the Board will give deference to an agency's penalty decisions, the Board requires agencies to determine penalties responsibly and fairly so that employees are equitably penalized for

like or similar offenses and extenuating circumstances are appropriately considered, and to present evidence with respect to the appropriateness of the penalty. The standard for review is one of reasonableness. The Board considers whether the penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary or capricious. See Swann v. Tennessee Valley Authority, 18 M.S.P.R. 290 (1983).

The Board has made it clear that not all of the factors need to weighed in an employee's favor before mitigation is appropriate: "Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances." Douglas, 5 M.S.P.R. at 306.

In sustaining Winlock's removal, the Board erroneously determined that Agency gave appropriate deference to the Douglas factors in determining that removal was appropriate. App. at 71a. However, the record reflects that in analyzing the Douglas Factors, Agency either advanced facts that mitigate against removal and support the Administrative Judge's determination that removal was inappropriate or failed altogether to address specific factors that would mitigate against removal.

Douglas Factor 1: The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities (including whether the offense was intentional; technical or inadvertent; or

was committed maliciously or for gain; or was frequently repeated)

In *Wynne v. VA*, 75 MSPR 127, 135 (1997), the Board held that Douglas Factor 1 should be considered first and foremost in any analysis of whether a penalty was proper under the circumstances. The Board states that two of the most important determinations will be "how serious was the misconduct" and "how did it relate to the appellant's job." *Wynne v. VA*, 75 M.S.P.R. 127, 135 (1997). For a severe penalty to be appropriate, an agency must show that the employee's misconduct resulted in a tangible harm. *Id.* For Douglas Factor 1, the Agency's Douglas Factors Worksheet states "N/A." As stated above, Winlock's only misconduct was his inability to do well on quizzes, which inability in turn bared no relation to Winlock's job or his abilities to perform the duties of his job, as the quizzes accounted for only approximately three percent (3%) of Winlock's overall performance rating. Respondent contended that Winlock's failure of the SOPQ's was sufficiently serious to warrant removal, because such failure related to the Agency's mission of ensuring safety of the traveling public. However, the Board has in several instances held that an agency will not be able to support a significant penalty if the employee is able to claim "no harm, no foul". See *Id.*; *Ciulla v. USPS*, 37 M.S.P.R. 627 (1988); *Canevari v. Dept. of Treasury*, 50 M.S.P.R. 311 (1991). The record showed no actual harm to the traveling public.

Douglas Factor 3: The employee's past disciplinary record

With regard to Winlock's past disciplinary record, Agency's Douglas Factors Worksheet states solely, "Excellent Record." The worksheet instructs the deciding official to state what consideration was given to the employee's past disciplinary record. The deciding official failed to provide this information.

Douglas Factor 4: The employee's past work record, including length of service and performance on the job

With regard to Winlock's past work record, Agency's Douglas Factors Worksheet states, "Dependable employee. Past performance records All met or exceeded standards." The worksheet instructs the deciding official to state what consideration was given to the employee's past work record. The deciding official failed to provide this information.

Douglas Factor 5: The effect of the offense upon the employee's ability to perform at a satisfactory level

Agency's response to the question on the worksheet reflects that Winlock's failure of the SOPQ's has "Little or no effect" on his ability to perform at a satisfactory level.

Douglas Factor 6: Consistency of the penalty with those imposed upon other employees

Agency did not provide any facts to support that removal was consistent with penalties imposed upon other TSM's who failed the SOPQ. Instead, Agency remarked that the penalty was "Consistent with existing policy at the time." As stated above, Agency's policy which presumes that failure of the SOPQ's constitutes poor performance warranting termination is inconsistent with precedent established by the Board. Such presumption is rebuttable based on the non-egregious nature of the failure. Under the facts presented in this matter, no penalty should have been imposed at all. To the contrary, if a penalty is found to be appropriate, removal is excessive given that by Agency's own admission, failure of the SOPQ's had "Little or no effect" on Winlock's ability to do his job and in turn did not compromise any legitimate government interest.

Douglas Factor 8: The notoriety of the offense.

As discussed throughout this brief, Winlock's failure of the SOPQ did not impact his performance and was not widely known. Therefore there was no notoriety whatsoever in connection with the failure.

Douglas Factor 10: The potential for the employee's rehabilitation.

Under the circumstances, Winlock's potential for rehabilitation was 100%. Just a few short

months after his removal, those employees in his position were no longer required to take the SOPQ's.

Douglas Factor 11: Mitigating circumstances surrounding the offence. The Douglas Factor Worksheet notes that Winlock might have failed the SOPQ because of the stress and tension caused by the performance criteria and the consequences it created. Perhaps one of the most critical facts overlooked by the Board in erroneously determining that the Agency gave appropriate deference to mitigating factors is the fact that Winlock's failure of the SOPQ had no tangible consequence whatsoever of than a note on his record that he failed. In addition, Agency concedes that the test does not test the abilities required of the Security Managers in Winlock's position. The quizzes were discontinued just a few short months after Winlock's removal and Agency knew that the discontinuance was being planned.

CONCLUSION

Because the MSPB abused its discretion in improperly weighing the evidence and assessing the credibility of the Agency and various witnesses and because the MSPB erred in holding that the Administrative Judge's review of Agency's Management Directive was interpretation of statute or regulation reviewable under petition, the decision of the MSPB should be reversed and the Agency's decision reversed.

Morris E. Fisher, Esq.
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(301) 469-3498

Counsel for Petitioner

COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,924 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/12, 2010.

(Signature)

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
O R D E R

A combined petition for panel rehearing and for rehearing en bane having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en bane be, and the same hereby is, DENIED. The mandate has already issued.

FOR THE COURT,

Jan Horbaly

Clerk

Dated 07/13/2010

Cc Morris E. Fischer

Hillary A. Stern

WINLCOK V DHS, 2009-3170

(MSPB – DA0752080261-I-1)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3170

SCOT R. WINLOCK, SR.,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board *in* CASE NO. DA0752080261-1-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (BRYSON, CLEVENGER, AND LINN, Circuit Judges.)

AFFIRMED. See Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

DATED: APR 09 2010 JAN HORBALY/S.W.

Jan Horbaly, Clerk

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3170
SCOT R. WINLOCK, SR.,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Morris E. Fischer, Law Office of Morris E. Fischer, of Bethesda, Maryland, for petitioner.

Hillary A. Stern, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With her on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Martin F. Hockey, Jr., Assistant Director.

Appealed from: Merit Systems Protection Board

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 23
Docket No. DA-0752-08-026 1-1-1
Scot R. Winlock, Sr.,
Appellant,
v.
Department of Homeland Security,
Agency.

March 6, 2009

Philip L. Watson, Esquire, Oklahoma City, Oklahoma, for the appellant.
Kim E. Garcia, Esquire, Coppell, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

The agency has petitioned for review of an initial decision that reversed the appellant's removal. For the reasons set forth below, we GRANT the agency's petition for review under 5 C.F.R. § 1201.115(d), REVERSE the initial decision, and SUSTAIN the removal action.

BACKGROUND

Effective February 8, 2008, the agency removed the appellant from his Transportation Security Manager position with the Transportation Security Administration (TSA) based on his unsatisfactory performance in that he failed two Standard Operating Procedures Quizzes (SOPQs) and, therefore, received a "Does Not Meet Standards" performance rating in the critical element Management and Technical Proficiency of his performance plan. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4d. The appellant appealed the removal action and contended that his performance was not unsatisfactory. IAF, Tab 1.

After affording the appellant his requested hearing, the administrative judge (AJ) issued an initial decision in which she found that the agency failed to prove that the appellant's performance was unsatisfactory. Initial Decision (I.D.) at 4-14. She thus reversed the appellant's removal. *Id.* at 1, 14.

The agency petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The appellant responds in opposition to the petition for review. *Id.*, Tab 4.

ANALYSIS

Because the appellant was an employee of TSA, this appeal is governed by the provisions of the Aviation and Transportation Security Act (ATSA). *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, (2005).

Under ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent the Administrator of TSA modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Connolly*, 99 M.S.P.R. 422, ¶ 9; *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004). Under 49 U.S.C. § 40122(g)(2), many of the provisions of title 5 do not apply, including, notably, chapter 75. Thus, the Board has held that chapter 75 does not apply to the FAA and, instead, the FAA's internal procedures are applicable. *See Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶ 10-11 (2008).

Pursuant to ATSA, the Administrator of TSA *has* modified the FAA's system by issuing Management Directive (MD) 1100.75-3, "Addressing Conduct and Performance Problems," on September 17, 2004. IAF, Tab 6, Subtab 4cc. MD 1100.75-3 does not purport to modify the list of title 5 provisions that are expressly applicable to the FAA and, thus, we conclude that the exclusions set forth in 49 U.S.C. § 40122(g)(2) also apply to the TSA. Therefore, as the AJ correctly found, the provisions of MD 1100.75-3, rather than chapter 75, apply to this appeal. IAF, Tab 24.

Further, as we recently held in *Roche v. Department of Transportation*, 110 M.S.P.R. 286, 17 (2008), only an individual who is an "employee" under 5 U.S.C. § 7511(a)(1) is entitled to appeal his removal to the Board under 49 U.S.C. § 40122(g)(3).

Because the appellant's position was in the excepted service, *see* IAF, Tab 6, Subtab 4u, and because he is not preference eligible, *id.*, he must show that he has completed two years of current continuous service in the same or similar positions under other than a temporary appointment limited to two years or less. *See* 5 U.S.C. § 7511(a)(1)(C)(ii).

The record is undisputed that the appellant was promoted to the position of Screening Manager effective April 4, 2004. IAF, Tab 6, Subtab 4dd. On April 1, 2007, as a result of a position review, the appellant's position was changed to Transportation Security Manager. *Id.*, Subtab 4u. The agency states, and the appellant does not dispute, that the change involved only a change in job title and that the appellant's duties remained the same as they had been. *Id.*, Subtab 1 at 1 n. 1. He was removed from the Transportation Security Manager position effective February 8, 2008. *Id.*, Subtabs 4a, 4b. Under the circumstances of this case, the appellant had completed more than two years of current continuous service in the same or similar positions under other than a temporary appointment limited to two years or less. Thus, he is an "employee" under 5 U.S.C. § 751 1(a)(1)(C)(ii) and he is entitled to appeal his removal to the Board under 49 U.S.C. § 40122(g)(3). *See Roche*, 110 M.S.P.R. 286, ¶ 17.

The legal standard to be applied in this case is to be found in MD 1100.75-3, which "sets forth the [agency's] policies and procedures on the use of disciplinary and adverse actions to address employee performance and conduct problems." IAF,

Tab 6, Subtab 4cc at 1, ¶ 1. The agency's policy provides that an employee may be removed "for such cause as will promote the efficiency of the service":

> This standard generally means that the action against an employee must be taken to further a legitimate government interest, e.g. because of the employee's (1) failure to accomplish his or her duties or fulfill his or her employment obligations satisfactorily, (2) interference with other employees' performance of their duties, or (3) detrimental effect on the agency's ability to accomplish its mission. *Id.* at 3, ¶ 6.B. 1.

Further, the agency's policy requires that there be a "nexus, or connection, between a legitimate government interest and the employee misconduct or matter that is the basis for the disciplinary action." *Id.*, ¶ 6.B.2. However, "[n]exus is presumed when the basis for disciplinary action is an employee's unsatisfactory job performance." *Id.*

¶10 The agency has a policy of progressive discipline, but permits removal as the first action taken against an employee "where the [performance is] so serious as to warrant removal." *Id.* at 4, ¶ 6.D.3. As to determining the penalty for any particular action, MD 1100.75-3 states:

> The following factors should be considered to determine an appropriate penalty. The considerations are often referred to as the "*Douglas* factors," based on a Merit Systems Protection Board (MSPB) case where these

> considerations were set forth. See *Douglas v. Veteran's* [sic] *Administration*, 5 M.S.P.R. 280 (1981). Not all of the factors are relevant in all cases, and other factors relevant to the case may also be considered.

Id. at 5, ¶ 6.F. The agency's policy then goes on to list the *Douglas* factors. *Id.* at 5-6; *see Douglas*, 5 M.S.P.R. at 305-06.

¶11 In other words, to prevail in an appeal of an adverse action before the Board, the agency must show that its action is for such cause as will promote the efficiency of the service, there is a nexus between a legitimate government interest and the matter that forms the basis for the action (although nexus is presumed when the charge is unsatisfactory performance, as here), and the penalty must be "appropriate" taking into account the relevant *Douglas* factors and any other relevant considerations. The agency's policy does not state the quantum of proof that the agency must meet before the Board. However, pursuant to 5 U.S.C. § 7701(c)(1)(B), which remains applicable to the agency under 49 U.S.C. §§ 114(d) and 40122(g)(2), *see Hart*, 109 M.S.P.R. 280, ¶¶ 9-10, the agency must prove its charges and its case by a preponderance of the evidence.

¶12 Turning to this appeal, the material facts are not disputed. During the relevant time period, the agency operated under a performance management system known as the Performance Accountability and Standards System (PASS). IAF,

Tab 6, Subtabs 4q, 4v, 4x, 4bb. Under PASS, Security Managers such as the appellant were rated on six critical elements known as "performance components": Management and Technical Proficiency; Competencies; Readiness for Duty–Dependability only; Supervisory Accountability; Training and Development; and Collateral Duties. *Id.*, Subtabs 4x at 6-7, 4bb at 6. A Security Manager's Technical Proficiency under the Management and Technical Proficiency critical element was judged in terms of his technical knowledge of standard operating procedures (SOPs) for passenger and baggage screening. *Id.*, Subtabs 4q at 9, 4v at 6. The agency measured knowledge of SOPs by administering mandatory SOPQs. *Id.*, Subtabs 4q at 9, 4v at 6, 10. Security Managers were required to achieve scores of at least 80% on two SOPQs and those who did not do so "[would] be subject to termination." *Id.*, Subtab 4v at 6-7, 10. A Security Manager who did not pass the SOPQs could not receive an "Achieves Standards" rating under the Management and Technical Proficiency critical element, and a Security Manager who did not receive an "Achieves Standards" rating on the Management and Technical Proficiency critical element could not receive a summary performance rating of "Achieves Standards." Hearing Transcript (Tr.) at 44-45 (testimony of Training Coordinator Alvin Burns).

¶13 It is not disputed that the appellant passed SOPQ1 on January 13, 2007, and was not required to take SOPQ2. Tr. at 18, 34 (testimony of Burns). It is also not disputed that the appellant did

not score at least 80% when he took SOPQ3 on May 30, 2007. IAF, Tab 6, Subtab 4gg at 5; Tr. at 19 (testimony of Burns). In accordance with the agency's procedure, IAF, Tab 6, Subtabs 4o, 4t, he was afforded thirty minutes of remediation immediately after the test, which included a detailed analysis of his incorrect quiz answers with the correct answers and a reference to the portion of the SOPs in which the correct answers could be found. Tr. at 19-22 (testimony of Burns); IAF, Tab 6, Subtabs 4l, 4r. In addition, he was placed on a performance improvement plan (PIP), under which he was required to take a forty-hour Basic Screener Training (BST) course. IAF, Tab 6, Subtab 4n; Tr. at 20 (testimony of Burns). The appellant successfully completed the BST course and, as a result, he completed the PIP successfully on August 16, 2007. Tr. at 20-2 1 (testimony of Burns); IAF, Tab 6, Subtab 4ff at 3. Following completion of the BST, the appellant was required to take SOPQ4. Tr. at 34 (testimony of Burns). He was given several weeks to study the SOP and was permitted to take SOPQ4 when he indicated he was ready to do so. It is further undisputed that the appellant took SOPQ4 on August 31, 2007, and did not achieve a score of at least 80%. IAF, Tab 6, Subtab 4gg at 5; Tr. at 22, 29 (testimony of Burns). Because he did not pass SOPQ4, he received a "Does Not Meet Standards" rating for the performance element Management and Technical Proficiency. IAF, Tab 6, Subtab 4k at 5; Tr. at 44-45 (testimony of Burns).

¶14 Based on the appellant's failure of SOPQ4 and his resultant failure to meet the

performance requirements for the Management and Technical Proficiency critical element of his performance standards, the agency proposed the appellant's removal on the grounds of unsatisfactory performance. IAF, Tab 6, Subtab 4d. After considering the appellant's written reply to the notice of proposed removal, *id.*, Subtab 4c, and based on his assessment of the *Douglas* factors, *id.*, Subtab 4f, the deciding official removed the appellant from his position effective February 8, 2008. IAF, Tab 6, Subtabs 4a, 4b. On March 25, 2008, the Administrator of TSA announced that, effective April 1, 2008, the agency would not administer any further SOPQs in 2008. IAF, Tab 14, Appellant's Exhibit B.

¶15 The AJ concluded that the agency failed to prove that the appellant's failure of SOPQ4 constituted unsatisfactory performance. I.D. at 13-14. She found that the agency failed to show that the quizzes accurately measured the appellant's performance under the Management and Technical Proficiency critical element. *Id.* She also determined that the agency's decision to eliminate the quizzes in 2008 tended to support the appellant's position that the SOPQs did not evaluate his performance. I.D. at 13.

¶16 In reaching this conclusion, however, the AJ discounted the agency's evidence concerning the purpose and nature of the SOP quizzes. Alvin Burns, the agency's Training Coordinator at the appellant's duty station, testified that the SOPs set forth "the guidelines for ensuring the safety of the travel of [the agency's] passengers." Tr. at 12-13.

The agency had both a management SOP and an SOP that contained the procedures for screening passengers and baggage. Tr. at 15. The agency required Security Managers to know the SOP because they supervise the agency's Screeners, who are the employees who actually perform the procedures. Tr. at 16. Burns explained that a Security Manager's knowledge of the SOPs was essential to his ability to detect when a Screener was not performing screening duties properly. Tr. at 16.

¶17 Assistant Federal Security Director for Training Robert Johnson also testified about the significance of the SOPs. He testified that the SOPs were the "total guidelines that we operate under on the [passenger security] checkpoint and in baggage, and the screening manager needs to have a strong working knowledge of that document in order to make sure that the operations are run correctly and that the procedures are followed so that the traveling public can be safe on their planes." Tr. at 49. He explained that a Security Manager's failure of an SOPQ would have an impact on the morale of the workforce: "The fact that he did not demonstrate the ability that he was completely knowledgeable in the SOP could certainly diminish the confidence of the workforce in [the appellant's] ability to provide the correct answers in a time of need." Tr. at 55-56. He expressed concern that, because the SOPs were "the bible of screening operations at the airport," and because Screeners also had to take SOPQs, if a Security Manager could not pass an SOPQ, the employees would lose their confidence in the

Security Manager "in the event of an emergency or something happens, about getting the right answer." Tr. at 60.

¶18 Deciding official Stephen Cortright, Federal Security Director, also testified about the importance of the SOPQs. He described the agency's mission as "the protection of the traveling public." Tr. at 86. He stated:

> Many of these tasks are performed under stress and under split- second decision making by the – by the employees and the managers and the supervisors involved. I think that a – the test that – relating to the standard operating procedures that are to be utilized and to know what those procedures are to be – how they are to be executed, is essential to our mission. And if you cannot or you are not aware of those standard operating procedures and how they may change from time to time and how they are implemented, then the efficiency of our service and our mission are not promoted. *Id.*

¶19 Phil Anderson, during the relevant time period, was the agency's Director for the Office of Performance Management and Improvement, and was responsible for the design, development, implementation, and management of PASS, including creation and administration of the SOPQs. Tr. at 112-15. Anderson testified that the agency required Security Managers to take and pass the SOPQs for several reasons. First, he testified that Security Managers needed to know the SOPs so they would be able to answer their subordinates' questions about the SOPs and requests for clarification of the SOPs. Tr. at 116. Second, he

testified that Security Managers needed to know the SOPs so they would be able to recognize during their observation of their subordinates' job performance whether the subordinates were performing their duties properly, and to provide correction if necessary. Tr. at 116. Third, he testified that, during the development of PASS, Security Managers as a group informed his office "that they wanted to start taking the assessments because they were getting a little bit fed up at the time with the perception by their employees that the security managers didn't know the SOPs." Tr. at 117. He testified that 98% of Security Managers passed the SOPQs on the first or second attempt, and they passed at the same rate as the general population of employees who took the quizzes. Tr. at 117-18.

¶20 In her initial decision, the AJ gave significant weight to the fact that the appellant received a "Does Not Meet Standards" on only the Technical Proficiency portion of the Management and Technical Proficiency critical element, and received at least an "Achieves Standards" rating on the five other critical elements of his performance plan as well as on the other components of the Management and Technical Proficiency critical element. I.D. at 13. However, in chapter 43 performance cases, the agency need only prove that the appellant's performance was unsatisfactory in at least one critical element. *See Thompson v. Department of the Navy*, 89 M.S.P.R. 188, ¶ 5 (2001). Similarly, in a performance-based action taken under chapter 75, where all charges are sustained, an agency's penalty decision is entitled to

deference and is reviewed only to determine whether the agency responsibly balanced the relevant factors in the individual case. *See Shorey v. Department of the Army*, 77 M.S.P.R. 239, 245, *review dismissed*, 155 F.3d 572 (Fed. Cir. 1998) (Table); *Madison v. Defense Logistics Agency*, 48 M.S.P.R. 234, 239 (1991). Here, the agency has presented evidence that a Security Manager's technical knowledge of the SOPs as measured by the SOPQs is so important that it is an essential component of the Management and Technical Proficiency critical element of the Security Managers' performance plan. IAF, Tab 6, Subtabs 4k, 4v; Tr. at 140 (testimony of Anderson). The managers of federal agencies, not the members of the Board, have the authority to decide what agency employees must do in order to perform acceptably in their particular positions. *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 14 (2004). Further, agencies are entitled to use their managerial discretion in establishing the performance standards by which an employee's performance is to be measured. *See Thompson*, 89 M.S.P.R. 188, ¶ 5.* As described above, the agency presented significant testimonial evidence showing that it had established Technical Proficiency, as measured by SOPQs, as an essential component of the Management and Technical critical element of the Security Manager position, as well as convincing testimony explaining why it believed a Security Manager's knowledge of the SOPs was critical to its mission. We discern no compelling reason to disturb the agency's exercise of its discretion in establishing the performance standards of the Security Manager

position, and we find that the AJ erred by discounting the agency's evidence.

¶21 Further, contrary to the AJ's finding, I.D. at 13, the agency's decision to discontinue the SOPQs in 2008 is not an indication that the agency thought the quizzes were not a valid measure of Security Managers' Technical Proficiency with the SOPs. Anderson explained that the decision to discontinue the quizzes for 2008 reflected the evolution of how the agency performs its mission. Tr. at 126-28. He testified that the agency places a lesser value on rote memorization of the procedures contained in the SOPs and a greater value on a more flexible performance of the agency's mission: "[I]f we do everything the same, day in

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* Both *Jackson* and *Thompson* are, of course, cases involving allegations of unacceptable performance brought under chapter 43. As noted above, TSA is not covered by many of the provisions of title 5, including chapter 43. *See Hart*, 109 M.S.P.R. 280, ¶¶ 9-10. Thus, the notions of management discretion discussed in those cases are not directly applicable here. Nevertheless, we find no indication that the Administrator of TSA intended for agency managers to have less discretion in managing cases of unacceptable performance under MD 1100.75-3 than they would have under chapter 43.

and day out, then that allows the people that [sic] intend to do us harm opportunities to figure out where the holes in the process are." Tr. at 127; *see* Tr. at 134-3 5. As part of its exercise of management discretion, an agency will from time to time change a position's critical elements and the means by which an employee's performance is measured. Management expertise resides with the agency, not with the Board. *McCluskey v. Department of Energy*, 720 F.2d 583, 588 n.2 (9th Cir. 1983); *see Jackson*, 97 M.S.P.R. 13, ¶ 14. Absent some evidence that the agency intended its change in the SOPQ policy to be retroactive, we see no reason to conclude that the agency's discretionary decision to change the means by which it measured Technical Proficiency in performance years subsequent to the one at issue in this appeal requires overturning the agency's charge.

¶22 In addition, we reject the AJ's finding that there was no evidence that the SOPQs measured the appellant's performance. I.D. at 13-14. The AJ suggests in the initial decision, *id.*, and in several of her comments during the hearing, Tr. at 8, 101-02, 105, 144, that a twenty-five question quiz on the SOPs would not measure actual on the job performance as accurately as direct observation would. The agency presented significant testimonial evidence concerning how the quizzes were developed and tested before they were administered to the employees, including the efforts the agency took to ensure that the quizzes were fair, did not test on overly obscure concepts, and were not so difficult that most employees could not pass them. Tr. at

113-15 (testimony of Anderson). In fact, 98% of Security Managers passed the quizzes on the first or second attempt, a pass rate consistent with that of the general population of employees who were required to take the quiz. Tr. at 117-18 (testimony of Anderson). Perhaps the agency could have developed some means of assessing Technical Proficiency via direct observation of the Security Managers' performance of their duties. However, the agency had considerable discretion to determine what the performance elements for that position would be and how it would be measured. Our task is to ensure that the agency proved by preponderant evidence that the appellant did not meet the performance standards of his position, not that his performance standards contain the most accurate of all hypothetical performance assessment strategies.

¶23 We find, therefore, that the performance standards at issue in this appeal were not an abuse of the agency's broad management discretion. We also find, based on the undisputed facts of record, that the appellant did not meet his performance standards because the documentary evidence shows, IAF, Tab 6, Subtab 4gg at 5, and the appellant concedes, IAF, Tab 14 at 2, Tab 17 at 2, Tab 20 at 1 n.2, that he did not pass SOPQ3 or SOPQ4. Thus, we find that the agency has proven by preponderant evidence its charge of unsatisfactory performance.

¶24 We must next determine whether the appellant's removal promotes the efficiency of the service. Under well-established Board case law, the

nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified*, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). This definition is substantively consistent with the agency's policy, which requires a connection between a legitimate government interest and, inter alia, the matter that is the basis for the disciplinary action. *See* IAF, Tab 6, Subtab 4cc at 3, ¶¶ 6.B.1-B.2. In fact, the agency's Management Directive provides that nexus is presumed in cases of unsatisfactory performance. *Id.* at 3, ¶ 6.B.2. We find, therefore, that the agency has proven that disciplinary action promotes the efficiency of the service.

¶25 Finally, we must consider whether the penalty of removal constitutes an abuse of the agency's broad discretionary authority. *Cf. Gray v. U.S. Postal Service*, 97 M.S.P.R. 617, ¶ 11 (2004) (the Board's review with regard to its review of an agency's penalty selection is not to displace management's responsibility, but to determine whether management exercised its judgment within the tolerable limits of reasonableness), aff'd, No. 05-3074, 2005 WL 1368093 (Fed. Cir. June 9, 2005). The agency's Management Directive requires the deciding official to consider the Douglas factors

along with all other factors that may be relevant in each individual case. IAF, Tab 6, Subtab 4cc at 5-6, ¶ 6.F. The record contains a Douglas Factors Worksheet that the deciding official completed and which documents his consideration of the Douglas factors, particularly the absence of any prior disciplinary record, the appellant's previous record of dependability and good performance, and the consistency of the removal penalty with agency policy. Id., Subtab 4f; Tr. at 86-87. In addition, the deciding official testified that he considered reassigning the appellant instead of removing him, but there were no available vacant positions for which the appellant qualified that did not involve screening duties. Tr. at 8 1-82.

¶26 The foregoing demonstrates that the deciding official considered the Douglas factors most relevant to this case and that the penalty of removal is within the tolerable limits of reasonableness. See Shorey, 77 M.S.P.R. at 245. Accordingly, we SUSTAIN the appellant's removal.

ORDER

¶27 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review

this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.
FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

SCOT R. WINLOCK, SR.

Appellant,

DOCKET NUMBER
DA-0752-08-0261-1-1

v.

DATE: September 5, 2008

DEPARTMENT OF HOMELAND SECURITY

Agency.

Philip L. Watson, Esquire, Hammons, Gowens & Associates, Oklahoma City, Oklahoma, for the appellant.

Kim E. Garcia, Esquire, Coppell, Texas, for the agency.

BEFORE
Marie A. Malouf
Administrative Judge

INITIAL DECISION

On February 28, 2008, Scot R. Winlock, Sr., appealed the action of the Department of Homeland Security, Transportation Security Administration, which removed him from his position effective February 8, 2008, The Board has jurisdiction over this timely filed appeal pursuant to 49 U.S.C. § 40122(g)(3). At the appellant's request, a. hearing was held.'

The agency withdrew its Exhibits 1, 2, and 3 and they are returned to the agency's representative with her copy of this Initial Decision.

Based on the following analysis and findings, the agency's action is REVERSED,

ANALYSIS AND FINDINGS

The agency bears the burden of supporting it's action by preponderant evidence

The appellant was employed by the agency as a Security Manager (SM) at the Tulsa International Airport in Tulsa, Oklahoma.[2] Appeal File (AF) Vol. 2, Tab 6(4u). The agency removed him from his position for poor performance. AF Vol. 2, Tab 6(4d). The agency's proposal notice provided in relevant part:

You are hereby notified that I am proposing to remove you from your position as a Transportation Security Manager (TSM), SV-1801-H and from the Federal service. This proposal is based on your unacceptable performance on the critical component of Technical Proficiency. If a decision is made to remove you, it will be effected no sooner than seven (7) calendar days from your receipt of this proposal,

Reason: Unsatisfactory Performance

Specification: The Performance Accountability and Standards System (PASS) requires all Transportation Security Managers to demonstrate management and technical proficiency on a semiannual basis by attaining at least a minimum performance level of "Achieves Standards" on a test of their knowledge of SOP.[3] You were given your

PASS Performance Plan and signed for it on . October 15, 2006. On May 30, 2007, you failed the SOPQ3 quiz and therefore were at the "Does Not Meet Standards" level of performance for Technical Proficiency. First, on the same day, you were given an opportunity to remediate on the failed technical requirements as indicated on a locally developed training form (Form 5, Screening Officer Training Form) and were briefed on remediation requirements. Secondly, you were directed to study the entire

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2 The record reflects that, effective April 1, 2007, the appellant was reassigned from the position of Screening Manager to the position of Transportation Security Manager. AF Vol. 2, Tab 6(4u). A Standard Form (SF) 50 documenting the reassignment reflects that it occurred as a result of a position review. *Id.*

3 SOP stands for standard operating procedure.

Checkpoint SOP and Management SOP, The final segment of your remediation was to include the successful completion of Basic Screener Training (BST). Following BST you were required to successfully complete SOPQ4. During the remediation period, which began on May 30, 2007, you were given every opportunity to improve your skills to meet the "Achieves Standards" level on the SOPQ. As outlined on your remediation form, you were scheduled to take the classroom portion of BST which was scheduled during August 2007. You were also directed to continue study of the Checkpoint and Management SOPs and told to notify your supervisor when you felt that you were ready to take the re-quiz. You successfully completed the Basic Screener Training on August 20, 2007. You were administered the second SOPQ4 (re-quiz) on August 28, 2007, after having been given time from May 30, 2007, until the date of your retest to study the required SOPs. You failed to meet the "Achieves Standards" level on the SOPQ4, and you were given notice of your failure to pass the SOPQ4 on August 28, 2007. Consequently, you have not met the performance requirements for technical proficiency as a Transportation Security Manager. In our pre-decisional meeting on October 26, 2007, you did not raise any technical or procedural issues.

TSA MD 1100.43-1, Performance Accountability and Standards System (PASS), requires Transportation Security Managers to achieve a level of "Achieves Standards" on all

components to continue in their position. Despite being provided with Basic Screener Training and given almost three months to study the SOPs, you were unable to meet the requisite level of performance on the retest of your knowledge of the SOP. Therefore, you are ineligible to continue your employment with TSA as a TSM, and I am proposing your removal to promote the efficiency of the Federal service.

AF Vol. 2, Tab 6(4d) (punctuation and grammar as in the original). The agency bears the burden of supporting its removal action by preponderant evidence,[4] 5 U.S.C. § 7701(c)(1)(b); 5 C.F.R. § 1201.56(a)(1)(ii); *Smith v. Department of Transportation*, 106 M.S.P.R. 59, 15 (2007).

Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(0)(2) (2008).

In response to the proposal notice, the appellant contended that the agency's action was unfair because it was not based on his qualifications as a Manager. Further, he asserted that the agency had acknowledged that its policy was not reasonable and had made changes to the PASS system for the next year. AF Vol. 2, Tab 6(4c). On appeal, the appellant reported that the PASS was only 3% of his 100% overall performance rating for 2007; indicated that his performance ratings in the past had always been "meets" or "exceeds;" and he had received awards for his performance. The appellant maintained that the SOPQs were designed to test Transportation Security Officers (TSOs), not SMs, and the questions on the SOPQs were not reflective of his duties. He noted that the agency had acknowledged that requiring the SOPQs was not reasonable and had changed the policy for the next year. The appellant contended that the Federal Security Director (FSD) had the discretion to retain him in his SM position, but was not notified of that option. Finally, the appellant asserted that he submitted a form to opt out of the PASS system but the agency failed to acknowledge receipt of the form, AF Vol. 1, Tab 1. The appellant has more than seventeen years of Federal service. *Id.*

The agency failed to prove its charge by preponderant evidence.

In October 2006, the appellant signed a Fiscal Year 2007 Performance Accountability and Standards System Sign-Off sheet in which he acknowledged that his rating official had explained the PASS performance components,[5] the

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performance components and sub-components are defined as work assignments and/or primary responsibilities of a position that contribute toward accomplishing overall organizational goals. Performance component and performance element are synonymous terms. Performance metrics are defined as Management approved criteria of the performance thresholds, requirements, or expectations that must be met by an employee in order to be rated at a particular performance level. A performance metric may include but is not limited to quality, quantity, timeliness, and manner of performance. Performance Metrics and Performance Standards are synonymous terms. AF Vol. 2, Tab 6(4x) at 3.

appellant's collateral duties, and a career plan. AF Vol. 2, Tab 6(4y). Under the PASS system, an SM is evaluated on the following performance components: (a) Management and Technical Proficiency; (b) Competencies; (c) Readiness for Duty — Dependability only; (d) Supervisory Accountability; (e) Training and Development; and (f) Collateral Duties. AF Vol. 2, Tab 6(4bb) at 6. In February 2007, the agency issued a PASS 2007 "User's Guidance and Metrics." That guidance provides that, in the Technical Proficiency component, SMs are held accountable for their technical (SOP) knowledge measured by means of SOP quizzes. AF Vol, 2, Tab 6(4v). In 2007, SMs were required to earn an "Achieves Standard" or better on two SOP quizzes and any SM who had "Does Not Meet" on two SOP quizzes was subject to termination.[6] *Id*, at 7.

Alvin Burns testified that he is a Training Coordinator in the Tulsa facility and he is the point of contact for PASS and responsible for ensuring compliance with the directives under PASS. Burns identified the TSA Management Directive on PASS. *See* AF Vol. 2, Tab 6(4x), He said that the information about PASS was given to Security Managers by e-mail and through the Lead Security Manager, the Assistant Federal Security Director (AFSD), and Federal Security Director (FSD). Burns reported that the information was also maintained on the PASS sharepoint site and online. According

to Burns' testimony, the PASS performance plan of an SM had six items. One of those items was the requirement to pass two SOPQs. *See* AF Vol, 2, Tab 6(4t).

Burns explained that the agency has SOPs that are guidelines for ensuring travel safety. Burns testified that the SMs needed to know the SOPs in order to supervise their subordinate employees. He reported that the SOPQs were

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The "Technical Proficiency Rating" matrix contained in the guidance provides that for a rating of "Achieve Standards" the employee must have a cumulative score of greater than or equal to 80% on the SOP quiz. An employee who has a cumulative score less than 80% is to be rated as "Does Not Meet Standards." AF Vol. 2, Tab 6(4v) at 10,

designed to test an employee's knowledge of the SO.

He said that the SOPQs were administered by computer. He explained that a special test administration program was uploaded and a passcode was entered to open the test. Burns related that one failure of the SOPQ prompted remediation and when an employee failed two tests the employee was subject to termination.

Burns testified that because the appellant passed SOPQ1, he was not required to take SOPQ2. Burns related that the appellant failed SOPQ3 and, under the agency's policies, he was afforded thirty minutes of remediation immediately after the test, and he made arrangements for the appellant to take the Basic Screener Training (BST) Course. Burns confirmed that the appellant completed the BST and passed the BST test, but he still had to take SOPQ4.[8] Burns testified that the appellant was placed on a PIP. *See* AF Vol. 2, Tab 6(4n). He indicated that the appellant was informed that he had to score of 80% on the next quiz, he was instructed to study the SOP over the next two weeks, and he would be given another quiz. Burns stated that the appellant was advised of the consequences if he failed the quiz. He said that the appellant completed the PIP on August 16, 2007. Burns indicated that the appellant had from May 30, 2007 to August 31, 2007 to study the SOP. AF Vol. 2, Tab 6(41).

Burns denied that the appellant was pressured into taking the SOPQ4 before he was ready, indicating that he told the appellant that he could take the test when he was ready. Burns conceded, however, that he approached the appellant and reminded. him that he needed to take the SOPQ4. He said that either the same day or the next day, the appellant said he was ready. Burns

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Burns testified that the appellant had access to the SOPS. He said that he believed that the SMs had copies of the SOPs in their offices and he e-mailed the SOPs or provided the SMs with an e-mail link to the SOPs.

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Burns reported that, after failing SOPQ3, the appellant was required to wait thirty days before taking the SOPQ4.

reported that, on SOPQ4, the appellant scored 18 out of 25 questions, but pass was 20 out of 25 questions. He indicated that when the appellant failed SOPQ4, he briefed the appellant on the consequences,

Burns confirmed that prior to 2006, an SM in baggage would not have been trained in the passenger SOP. He explained that, at one time, an SM was assigned either to the baggage section or to passenger section, but because of the number of security managers, cross training began in 2006. He said that, once the appellant failed the second test, he thought the appellant was subject to termination but he could also have been moved to another position or could have competed for another position. Burns said that an SM could never receive an achieves performance rating if the SM failed two SOPQs.

With regard to an employee's opportunity to opt out of PASS, Burns confirmed that, if an employee was not working primary duties most of the time, the employee could opt out of the pay for performance. He said, however, that the appellant was not eligible for opt-out because of his duties as Security Manager.

Robert Johnson, the Assistant Federal Security Director for Training, testified that he has overall responsibility for passenger and baggage screening at the Tulsa International Airport. In 2007, he was the reporting supervisor for SMs. He indicated that SMs are responsible for the daily operation of checkpoints and baggage and are the responsible agency official on the floor when Johnson is not present. He said that SMs need to have a strong working knowledge of the SOPs, which provide guidance for all the daily operations. Johnson said that there are two separate screening areas: baggage and passengers. He related that the appellant originally started work for the agency as an SM in the baggage area section, but due to staff cuts, the agency was forced to dual qualify all of the SMs and the appellant was the last of the baggage specific SMs to dual qualify. Johnson reported that there was no set cross training procedure but they had the SMs learn the SOPs and spend time at the passenger checkpoint. He indicated that it took a couple of months to get the SMs cross trained and once the appellant became "dual qualified" he was responsible for both areas.

Johnson testified that the appellant was provided a 2007 performance agreement that listed performance expectations. *See* AF Vol. 2, Tab 6(4y). He confirmed that the SOPQs were 3.2% of the overall performance score for an SM. He indicated that there were also other components in the appellant's PASS performance plan but the agency's policy required the SMs to pass two SOPQs as a condition of employment. Johnson explained that an SM needs to have a thorough knowledge of the SOPs

and if the SM does not know the SOPs, then there is a question concerning the SM's competency. Johnson confirmed that the SOPQ contains twenty-five questions and when asked whether the answers to twenty-five questions could accurately reflect performance, Johnson replied that the agency had established the SOPQ policy and he was not in a position to question that policy.
Johnson testified that Burns notified him that the appellant had failed the SOPQ3 and they discussed the procedures to be followed. Those procedures included a PIP; remediation concerning knowledge of the SOP; and retaking the classroom portion of the Basic Screener Training. Johnson indicated that he believed approximately 90 days passed between the time the appellant took the SOPQ3 and the SOPQ4. Johnson stated that he told the appellant he could take SOPQ4 whenever he was ready. Johnson related that even though the appellant failed SOPQ3, he was not removed from his job duties. Johnson explained that the appellant continued to perform his duties because Johnson had asked for an exception to the policy and he believed that he could hold the action in abeyance until he received the answer from Washington. He said that he felt the appellant could still be effective and, if he had any questions, Johnson was available.

Johnson said that he observed the appellant's performance and there were criteria that he considered in evaluating the appellant's overall performance under the PASS system. Johnson testified that the appellant is a "good guy" and he did a good job for the agency. He had direct

observation of the appellant in the performance of his duties and he appeared competent to perform the duties. He said that, except for the failure on the two SOPQs, the appellant's performance was not poor. Johnson testified that the agency discontinued the use of the SOPQs for 2008.

Johnson reported that Mo McGowan is the Assistant Administrator for the Office of Security Operations in Washington, D.C. He indicated that he sent an e-mail to McGowan because he wanted to see if they could get an exception to the existing policy for another employee who was in a similar situation. McGowan said that he would get back to him but he did not receive a return response and, at the close of the PASS year, he contacted headquarters (HQ) to determine what should be done. He said that HQ said that the only option available was to propose the appellant's removal based on poor performance. Johnson stated that the wording of the proposal notice was based on the agency's policy and he had no discretion in what was contained in the proposal notice.

Phil Anderson testified that he is the "Team Lead for the Office of Performance Management and Improvement (OPMI)" and in 2006, he was the Director of OPMI. He said that in 2006-2007, he was responsible for the design, development, implementation, and management of a new performance management system. He said that TSA implemented PASS in April 2006. He explained that the PASS system was developed because the agency was created as a performance based organization. and the agency needed d performance management system that aligned what an individual employee

was required to do with the agency's goals and mission. He indicated that the agency wanted to ensure a systematic and integrated approach to managing and improving performance that had quantifiable and measurable goals so that employees would know what they were expected to do and how well they were expected to do it.

He reported that the PASS system also established competencies and a defensible process for rewards, termination, and remediation.

Anderson stated that employees are required to know the SOPs and the SOPQs were developed to ensure that employees had a basic knowledge and understanding of the SOPs. He said that his office developed the SOPQs by starting with the SOPs and working with a "Procedures Group" and a contractor who helped manage the logistics. He indicated that the SOPQ questions were written and reviewed by the "Procedure's Group's and they pilot tested, He said that .400-500 questions were developed from the SOPs, then personnel psychologists and the "Procedures Group" reviewed the questions and reduced the number of questions to 300. Anderson indicated that the questions were then sent out to pilot participants. He reported that ultimately, the SOPQs only used those questions that 75% of respondents had answered correctly. Anderson explained that, as a result of meetings in the field, it was decided that the SMs should also take the SOPQs. He said that 98% of the SMs passed the SOPQs on the first or second attempts.

According to Anderson's testimony, when an SM failed two tests, one of three things had to

happen: (1) the employee was terminated; (2) the employee was reassigned to non SM position, or (3) the employee had to apply for another position. He stated his belief that a failure on the SOPQ demonstrated that the employee did not know the SOPs and showed an inability to meet a standard of the job. Anderson conceded that there was no follow-up to determine whether the SOPQ test results related to the actual performance of the SM duties. Further, he acknowledged that for 2008, the agency had eliminated the requirement for SMs to pass the SOPQs. He asserted that the SOPQs are no longer used because the SMs job requirements had changed; the agency no longer needed employees to have rote memorization of the SOPs; and for other reasons that were known only to higher level officials. Anderson conceded, however, that he did not know whether the appellant's job description or duties had changed. The agency's policy reflects that the SOPQ portion of the technical proficiency component comprises 3% of an SM's performance score, When asked whether the other 97% of the appellant's performance was irrelevant to the rating, Anderson replied that knowledge of the SOPs was so important that it constituted a critical element of the appellant's position and failure on that component alone meant the SM's performance was unsatisfactory.

Stephen Cortwright testified that he is an FSD, and he was the deciding official in this case. He reported that during 2007, TSA evaluated an SM's technical proficiency primarily through a series of quizzes and exams in addition to the other areas that were evaluated. He said that the appellant did

not meet the technical proficiency performance standard because he failed two SOPQs. Cortwright confirmed that prior to 2007, the appellant had a good record. He related that there were other factors that were used for the overall performance evaluation, including observation of the appellant performing his duties, but the appellant's failure on the SOPQs meant that he did not meet the Technical Proficiency standard, Cartwright testified that he had never seen an SOPQ or any of the questions. Cortwright testified that, except for the appellant's scores on the SOPQs, his performance from 2006 to 2007 was the same. Cartwright testified that the appellant's removal was based solely on his failure to pass two SOPQs,

The appellant testified that he worked primarily in the baggage section and in 2006, he was only required to take a test on baggage. He said that he did not start screening passengers until 2007. He said that he worked ·baggage 90% of the time and was a relief manager for passenger screening. He said that his supervisor observed his performance and he was never told that his performance was deficient. He confirmed that he had to evaluate his subordinate employees based on their performance under the SOP. The appellant testified that the SOPs changed but employees were not tested every time the SOPs changed. He stated that when there were changes, they would have a meeting with the managers and employees would be briefed.

The appellant confirmed that he failed SOPQ3 and SOPQ4; that he was told he had to improve his performance; and that he took the BST. He stated that his removal was not really based on

his performance, however because the questions on the SOPQs did not relate to his job performance. He conceded that the agency's policy provided that action should be taken after two failures, but said that the policies were constantly changing and the agency had recognized that the SOPQs were not appropriate. The appellant testified that he believed the agency should have allowed him to opt out of the PASS system. Further, he stated that he believed that proper application of the agency's policy would have allowed him to remain in his position.

The record reflects that messages, notices, and/or policies and guidance regarding SMs and the SOPQs were issued on March 30, 2006, February 2, 2007, March 1, 2007, March 5, 2007, April 20, 2007, April 24, 2007, April 25, 2007, May 3, 2007, May 15, 2007,[9] June 1, 2007, July 1, 2007, and July 18, 2007. Thus, throughout the time period that the appellant was subject to the SOPQ requirement, the agency was modifying, clarifying, and adjusting the requirements. The appellant contended that the agency recognized that the SOPQ requirement was not appropriate, because, on March 25, 2008, TSA Administrator Kip Hawley announced to agency employees that, effective April 1, 2008, SOP testing would no longer be done. In his statement, Hawley stated:

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[9] In a May 15, 2007 notice entitled "PASS HOT TOPICS," the agency advised that a patch for the SOPQs 1, 2, 3, and 4 were uploaded to the system and ready to be downloaded. The notice provided that it was the Quiz Administrator's responsibility to read the appropriate instructions prior to administering any

of the quizzes to ensure everyone was taking the correct quiz. AF Vol. 2, Tab 6(4s) at 3. The agency provided no evidence to show that the Tulsa Quiz Administrator had downloaded the patch, had provided appropriate instructions to the appellant, or had ensured that the appellant took the correct quizzes on May 30, 2007 and/or August 31, 2007. The appellant did not assert, however, that he was given incorrect quizzes.

> No more SOP tests in 2008. We will be making SOP changes and bringing out significant new training in 2008. If you pass that training, that's what we're looking for we want our employees doing their job and gaining knowledge through training and experience, not bogged down with SOP assessment requirements or the timing of training and testing releases.

Appellant's Ex, B, AF Vol. 1, Tab 25.

The agency contended that the 2008 changes were not retroactive and are not applicable in this appeal. While the agency is correct that the changes are not retroactive, the changes reflect an evaluation by the agency of the necessity of the SOPQs to test performance. If, as the agency maintained, passing the SOPQs was so critical to the performance of an SMs position in 2007, the explanation for the elimination of that requirement in 2008 supports the appellant's contention that the SOPQ did not, in fact., evaluate his performance. Both Johnson and Cortwright testified that the only reason for the appellant's removal was his failure on the two SOPQs. The appellant's Security Manager PASS Performance Rating Summary Sheet for FY 2007,

ending September 2007, reflects the following: (1) a "Does not Meet" on SM Technical Proficiency, but an "Achieves" and "Exceed" on all of the other components under Management and Technical Proficiency; (2) an "Achieves" on Training and Development; (3) a "Role Model of Excellent" on Readiness for Duty; (4) an "Achieves" on Supervisory Accountability; (5) an "Achieves" on Competencies; and (6) a recommendation for a 6% bonus allocation for his performance of collateral duties. AF Vol. 2, Tab 6(4k). The SOPQ requirement is only one part of the component labeled "Manneney." I am not persuaded that the appellant's failure on the SOPQs warranted a "Does Not Meet" on the entire performance component of "Management and Technical Proficiency." Further, despite the agency 'contentions that the twenty-five question SOPQ adequately measured an employee's knowledge of the SOP, the agency did not submit any evidence to show that the SOPQ measured performance in any way, In fact, the agency's witness acknowledged that the agency did not make any effort to determine whether the SOPQs actually measured performance. Based on the evidence before me, I find that the agency has failed to prove by preponderant evidence that the appellant's performance was unsatisfactory and the agency's charge is not sustained. Because the charge is not sustained, I find that the removal action must be REVERSED.

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the appellant's removal and to retroactively restore the appellant to his Security Manager position, effective February 8, 2008. This must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I ORDER the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov.

INTERIM RELIEF

If a petition for review is filed by either party, I ORDER the agency to provide interim relief to the appellant in accordance with 5 U.S.C. §

7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

Marie A. Malouf
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on October 10, 2008, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board, However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing, A petition for review submitted by electronic

filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt, You may meet your burden by filing evidence and argument, sworn or under penalty of perjury *(see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201,4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law,

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail:

Scot R. Winlock, Sr.
424 E. Carson Lane Mustang, OK 73064

Appellant Representative

U.S. Mail:
Phillip L Watson, Esq.
Hammons, Gowens & Associates
Attorneys at Law
325 Dean A. McGee Avenue
Oklahoma City, OK 73102

Agency Representative

U.S. Mail:

Kim E. Garcia, Esq.
Department of Homeland Security
Transportation Security Administration
Mission Support Center
510 Airline Drive
Suite 100
Coppell, TX 75019

September 5, 2008
(Date)

Diana M. Picknell
Legal Assistant

U.S. Department of Homeland Security
Arlington, VA 22202

Transportation Security Administration

Date: November 13, 2007

To: Scott Winlock
Transportati... Security Manager
Tulsa International Airport

From: Robert Johnson
Assistant Federal Security Director
Tulsa International Airport

Subject: Notice of Proposed Removal

Ref: ER Case Number 712765

You are hereby notified that I am proposing to remove you from your position as a Transportation Security Manager and the Federal government in order to promote the efficiency of the Federal service for failing the Passenger PASS Standard Operating Procedure (SOP) quiz and re-quiz. You met with me on October 26, 2007 for a pre decision discussion on this matter. A decision will not be made earlier than seven (7) calendar days from the date you receive this letter. This proposal is based on the following

Reason: Poor Performance

Specification: You failed the PASS Passenger SOPQ2, re-mediated by taking the BST and passing the final test, but failed to pass the re-quiz on SOPQ2, a condition of continued employment as a TSM under the most current policy dated 7/18/2007. In determining the appropriateness of this penalty, I am guided by current TSA policy that requires your removal for poor performance, reassignment to a non-TSM position, or compete for a current non-TSM position for which you are qualified. The latter two options do not exist here leaving removal as our only option.

This notice is a proposal and not a decision. You have the right to reply to this proposal orally and/or in writing and furnish any evidence in support of your reply within seven (7) calendar days after the date you receive this proposal.

Recognizing that policy change is near for TSMs under PASS, can you provide me with options for the FSD?

Original Message
From: Johnson, Robert *C*
Sent: Thursday, October 18, 2007 2:26 PM
To: McCann, Dan
Cc: Cortright, Stephen

Subject: RE: FSD Flexibility to Retrain and Retain Screening Managers

Dan,

Please see below the information requested as per our phone conversation this morning. Thanks for your help!

Test Results - TUL has two TSMs who have failed a PASS Quiz twice.

Follow up Action — Both TSMs are high performers and significant contributors to the FSD staff. I discussed the issue with Mo McGowan during his visit to TUL in June. It appeared to me that MO shared my concerns about losing high performing personnel, and he asked me to send him an e-mail concerning the issue. Mo's response to me was "Will Advise". Pending guidance from HQ, we have continued to utilize these individuals in their capacity as TSM. I sent a follow up e-mail October 17, 2007 requesting clarification.

Desired Action by TUL · We would propose that our FSD, based on first hand knowledge of all aspects of TSM performance, be granted the authority and flexibility to make the ultimate determination if these individuals should be retained or not with appropriate sanctions and re-training, or that we simple be authorized to retain these individuals with appropriate financial sanctions.

Bob

I hear you've spoken with Bob Johnson, Kevin, and informed him - or perhaps me - that retain/retrain *is* n/a for TSMs. Thanks! I have a narrow question, or two actually:
* Are you aware of status of the four apparently "failed" TSMs at TUL? * Are you satisfied with that status?
Please let me know.

Original Message
From: McCann, Dan
Sent: Wednesday, October 17, 2007 1:10 PM
To: Johnson, Robert *C*
Cc: Cortright, Stephen; Chapman, Gerald; McGowan, Morris; Millard, Nicole Subject:
RE: FSD Flexibility to Retrain and Retain Screening Managers

R/R is an option for TSM, Bob. Frustration is in placing TSMs in BST with TSOs they supervise, or, less bad, tdy'ing the 'failed' TSMs to distant trng. Even then, they throw off course dynamic for TSOs and instructors. Plus, they're being tested/trained to standards they are not recruited/trained/evaluated against. TSM is never meant to be certified T50, any more than you or I.
PASS PM *is* improving matters...near final on testable knowledge requirements for TSM under PASS. They will apply to TSMs during FY08.
Follow-up with Kevin Wolinski or Rich Revzan in Phil Anderson's shop, Bob. Let me know if you need contact info.

Sent using BlackBerry

From: Johnson, Robert *C*
Sent: Wednesday, October 17, 2007 12:54 PM
To: McCann, ban
Cc: Cortright, Stephen; Chapman, Gerald; McGowan, Morris; Millard, Nicole

Tranportation
Security
Administration

Performance Accountability & Standards System
2007 User's Guidance and Metrics for
Technical Proficiency

In the Technical Proficiency component, Security Officers are held accountable for their technical knowledge, as well as, their ability to use that knowledge to perform the essential functions of the Security Officer job. Security Managers are held accountable for their technical (SOP) knowledge. Technical knowledge is measured by means of Standard Operating Procedure (SOP) quizzes. Technical ability is measured by means of image quizzes and practical skill observations and demonstrations. Practical skill observations and demonstrations are conducted by the Officer's supervisor, as well as, an outside contractor.

In 2007 all Security Officers earning their initial certification before July 3, 2007, regardless of their hire date, must complete 2 SOP Quizzes and 3 Practical Skills Observation Checklists in order to be part of PASS 2007 and to earn their 2007 Recertification designation.

For information on what actions to take when an employee performs below the *Achieves Standards* level please refer to the *Remediation Decision Matrices* located on the PASS 2007 webpage.

SOP & Image Quizzes

SOP Quizzes are comprised of randomly selected multiple choice questions based on TSA's SOP guidance. Image Quizzes are comprised of selected images of carry on luggage that may or may not contain prohibited items. A local test administrator is designated to administer the Quizzes. Quizzes are password protected and are opened and administered by the test administrator at the time that the Quiz is taken, in accordance with the Test Administrator's Guide for PASS Quizzes.

Method

The local designated test administrator is responsible for scheduling Quiz sessions and proctors; administering Quizzes in a proctored testing environment; and following all guidelines outlined in the On-line Performance Quiz User's Guide. The manager or supervisor and the employee are responsible for making appropriate testing arrangements with the Test Administrator to ensure that SOP Quizzes are taken in a timely manner.

Frequency

In 2007 all Security Officers and Managers will be required to earn an Achieves Standards or better on 2 SOP Quizzes. In addition, all PAX and Dual

Function (non OSARP) Security Officers will be required to earn an Achieves Standards or better on 2 Image Quizzes; BAG only OSARP certified Officers will be required to earn an Achieves Standards or better on 1 OSARP Quiz; Dual Function OSARP certified Officers will be required to earn an Achieves Standards or better on 1 OSARP Quiz and 1 Image Quiz.

- All Security Officers and Managers will, upon its release, complete SOP Quiz #1. All PAX /Dual Function Security Officers will also complete Image Quiz #1.

- Security Officers and Managers that earn an Achieves Standards or better on SOP Quiz #1 are exempt from having to take SOP Quiz #2. Security Officers that earn an Achieves Standards or better on Image Quiz #1 are exempt from having to take Image Quiz #2.

TSA MANAGEMENT DIRECTIVE No. 1100.75-3
ADDRESSING PERFORMANCE
AND CONDUCT PROBLEMS

f. Termination of a reemployed annuitant;
g. Termination at any time of a time-limited appointment of two years or less;
h. Expiration of a time-limited appointment of more than two years;
i. Correction of an erroneous personnel action, including correction of a pay band or rate of pay that is contrary to law, regulation, or TSA policy;
j. Action directed by a court or other competent authority; and
k. Voluntary action initiated by the employee.

5. **Matters Reviewed by the Professional Review Board (PRB):** Where conduct of an employee covered by MD 1100.75-2, is the subject of an investigation or management inquiry by a TSA line component, by the Office of the Assistant Administrator for Internal Affairs and Program Review, or by the Office of the Inspector General, the PRB will review the report of investigation and may propose any action it deems appropriate in accordance with MD 1100.75-2.

6. **Consequences:** In addition to demonstrating that the employee was on notice about the performance or conduct in question, or to rebut a claim that the employee had no prior history of conduct or

performance problems, actions covered by this Directive may have adverse collateral consequences, such as when making decisions on awards, promotions, or workforce reductions.

B. Cause:

1. **Efficiency of the Service Standard**: An employee may be suspended, removed, or reduced in pay hand or rate of pay for such cause as will promote the efficiency of the service. This standard generally means that the action against an employee must be taken to further a legitimate government interest, e.g. because of the employee's (1) failure to accomplish his or her duties or fulfill his or her employment obligations satisfactorily, (2) interference with other employees' performance of their duties, or (3) detrimental effect on the agency's ability to accomplish its mission.

2. **Nexus**: Disciplinary action may be taken when there is a nexus, or connection, between a legitimate government interest and the employee misconduct or matter that is the basis for the disciplinary action. Nexus is presumed when the basis fár disciplinary action is an employee's unsatisfactory job performance or on-duty misconduct, or in the case of criminal activity or other egregious or especially notorious misconduct. However, actions

also may be taken against an employee because of off-duty misconduct where there is a nexus between the conduct and the TSA mission and/or effective operation of the agency.

3. **Actions Not Involving Misconduct:** Certain actions by an employee that are not considered misconduct or poor performance may also promote the efficiency of the service. For example, if an employee declinEs to accept a directed reassignment or transfer of function to another commuting area, the declination would not be considered misconduct, but the employee's termination would nevertheless be taken "for such cause as will promote the efficiency of the service."

A couple of pages, let me see here. Did you find it, Mr. Johnson, I'm sorry.

Q. The reason for—it has on here, the reason for Mr. Winlock's termination was poor performance. Would it be clearer to say poor test performance? Or do you believe it's poor performance, as it's stated?

A. The wording in that document is strictly based on Agency policy. And I don't have the latitude to change that wording.

Q. Now, I heard prior testimony that the testing was 3.2 percent of the total points, I guess an SM acquired for his evaluation or is that – do you agree with that statement, it's 3.2 percent of their total –

A. I believe that number's right – I believe that number is correct. There's a (indiscernible) that has weights and percentages.

Q. So basically the other percentage doesn't really matter if the – if the testing is the only – well, do you believe the testing is the only measure that the agency put in place?

A. No, there are other components to pass.

Q. Okay. If you – if you did not pass the two tests then, would a SM be able to keep his job?

A. Well, the agency policy at this time was a double failure of an SOP quiz was conditions for

Passenger – I'm sorry, baggage and passengers, those are two separate areas of the –

A. Two separate areas, but once Mr. Winlock became dual qualified, he was responsible for both areas.

Q. Okay. They're two areas, but they're intertwined; is that basically –

A. yes. Both – both areas are operated by Transportation Security administration and then TSO's function in both areas. One, they inspect passengers for safety, and the other one's inspect baggage for safety.

Q. And you stated earlier that you tried to do what you could to – if I'm stating it right, retain Mr. Winlock's employment.

A. Yes, sir.

Q. did you believe he's a competent employee?

A. Scot was a good guy and he did a good job for us. I wasn't trying to get a change of policy of anything; I was trying to get an exception so that he could keep his job. I mean, personally I think it's anything a good manager would do for a good employee.

Q. So you did try to get an exception for him, is what you're saying –

A. Yes, sir –

MR. WATSON: Okay, your Honor, that's all I have right now.

First one, he takes the second one. So there's at least 50 questions that they have – they have to be able to answer correctly or two 50 – two 25 question quizzes that they have to take. And our personnel psychologist testing experts have determined that that is statistically relevant based on the content of our SOPs. So, yes, the 25 question **

A. The 25 question quiz is a measure of performance and – in – in our eyes, because we have to make sure that our employees have the ability, have the skill, have the knowledge, to do the job when they're called upon to do.

Q. [BY MS. GARCIA:] But, if – if Mr. Winlock has been performing this job since 2002, and – then why is it now that we're testing the SOP knowledge?

A. Again, as I said – as I indicated before, prior to the past program rolling out, well, the security managers – they were rated on a very general set of – of – I don't even want to call them competencies. But on a very general set of components.

It was a very subjective way – when (indiscernible) it came out loud and clear that they needed to start being tested on the SOP quizzes so that they could show their – show their workforce that they knew what they were doing.

Certain raise and a certain (indiscernible) above and beyond the standard rate that was – that is authorized by the President of the United States.

Q. Okay. Now, you may argue with this, but it is my understanding that the testing was about 3.2 percent of his total evaluation score. Do you agree with that statement?

A. Yes, it is. And that's in line with the TSOs, the lead TSOs, and the supervisory TSOs, also.

Q. Okay. So the other 87 or 80 – What percentage is – isn't relevant?

A. 97 percent, actually.

Q. Okay. That's irrelevant, though, if they –

A. No, nobody said that. But as I have indicated before, knowledge of the SOPs has been determined to be a critical element. Which in forms – in many – federal Agency means that it's a part of your – part of your job requirements that have been deemed to be so necessary to have, that if you're unable to demonstrate proficiency or perform – a satisfactory performance in that area, your overall performance evaluation cannot be anything above unsatisfactory. So that's what's – that is going on with the SOP quizzes. They are – they are determined to be a critical element of this position.

A. Correct.

Q. And you – you said that the SOPs were constantly changing, you'd have meetings with your –

A. Yes.

Q. Did you – you – you were tested – your employees weren't tested either, is that –

A. Correct.

Q. Okay. And let me just – maybe I need to clarify this too. In February, were you told not to come back in February; is that correct?

A. I believe in February is when I finally reached – I finally received my final termination notice.

Q. and you got your removal letter, is that what you're saying?

A. that's correct.

Q. What, in your opinion, does technical proficiency mean?

A. Honestly, I don't know.

Q. Okay. Do you feel like you were ever – I know the – the quiz is supposedly about technical – were you ever told what that – what that meant, though? what